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Letters of expectation

While it is permissible for an employer to provide a general written statement of its expectations to an employee, an employer may not disguise discipline in the form of a letter of expectation. The burden of proving a prima facie case that a document is disciplinary in nature falls to the union. Once such a prima facie case is made out, the burden then shifts to the employer to prove it has just cause to impose the discipline. The arbitration decision in *Re Hilton Villa Care Centre and BCNU*¹ clarifies the sometimes blurry line between letters of expectation and disciplinary letters.

The facts of the case were that the employee, a registered nurse, had received a letter entitled "Re: Letter of Expectation" which began with the following sentence: "I am writing this non-disciplinary letter of expectation...". The letter

documented an incident involving a patient and the employer's "concerns" regarding the employee's conduct in handling the incident.

The employee grieved the letter on the basis that it was disciplinary on its face despite the employer's statement that it was not, and sought the removal of it from her personnel file. The employer contended that the letter was non-disciplinary, would not be used in future disciplinary proceedings, was not an "adverse report" as defined in the collective agreement and therefore, was not grievable.

Arbitrator Gordon considered the analysis of the same issue in *Re Alberta Hospital Edmonton and HSAA*² and the following list of differences between non-disciplinary letters of expectation and disciplinary letters:

Performance Expectations Letter	Disciplinary Letter
Purpose: to counsel and communicate, to identify or clarify expected behaviour in performance of job duties.	Purpose: to correct poor performance or undesirable behaviour — assumes that discipline is needed to achieve correction.
Employer's Intention: helpful, supportive.	Employer's Intention: disciplinary.
Examples used only as a means to clarify inappropriate or acceptable behaviour.	Nature of Employee's conduct: culpable — specific incidents of poor performance, or infraction of a rule, policy or standard.
Support is offered by way of training and/or other resources.	Should be clearly stated to be disciplinary.
Develops, with employee's input, mutual goals to encourage employee's commitment to change.	Does the employee have to grieve the letter to be able to respond effectively to it?
Focus: assumes behaviour will change in future, when an employee understands what is expected and is supported in an effort to change.	Focus: expected behaviour is identified, but consequences are attached to present and prescribed standards.

More...

A review period is set to give feedback on progress of change.

A future disciplinable offence will be treated with no reference to this letter as a foundation for any progressive discipline. This letter may only be used to show that the employee was aware of the employer's requirements.

May require compliance with provisions of the collective agreement, such as the presence of a union representative, when discipline is imposed.

Negative impact on employee's work record. Part of progressive discipline — further incidents of a similar nature may be followed by further, possibly increased, discipline.

In order to determine the character of the letter in dispute, Arbitrator Gordon adopted the same approach as that used in the *Re Alberta Hospital* case. She looked to the facts and the circumstances surrounding the disputed letter including the following:

- other relevant correspondence and surrounding circumstances, if it helps the arbitrator to interpret the letter;
- whether the letter is specifically directed at particular employees;
- whether the letter accuses the employees of misconduct of a culpable nature;
- whether the letter refers to possible disciplinary action if the conduct persists;
- whether the letter suggests that the employee's actions are ill-founded or improperly handled;
- whether the language used in the letter refers to communications of performance expectations rather than the identification of concerns or unacceptable or insubordinate behaviour possibly warranting discipline in the future if continues;
- whether the purpose of the letter appears to have been to correct undesirable behaviour by specific employees;
- whether the employer addresses its concerns in a supportive manner and whether any support is offered to improve or overcome the perceived problems; and

- whether the letter itself is in a disciplinary format.

With respect to the employer's statement that the letter was not disciplinary or would not be used in future disciplinary proceedings, Arbitrator Gordon adopted the reasoning in *Re Foothills Provincial Hospital and UNA Local 115*³ that if a communication to an employee is disciplinary either by its intent or on its face, such a statement by the employer cannot alter its basic character.

In the end, Arbitrator Gordon allowed the grievance finding that the basic character of the "letter of expectation" was disciplinary. Since there had been no further disciplinary action within the relevant period of time under the sunset clause of the collective agreement, the letter was removed from the employee's personnel file. The issue about whether the letter was an "adverse report" as defined in the collective agreement was not determined since the letter was removed from the file and the matter concluded. However, this issue will inevitably arise again in the future and when it does, this decision should be very helpful.

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Footnotes

¹ (2003) 115 LAC (4th) 154

² (1998) 69 LAC (4th) 289

³ (1992) 29 LAC (4th) 258